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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 31

SERVICE EMPLOYEES INTERNATIONAL UNION, UNION LONG TERM CARE WORKERS, Charging Party, and MONTECITO HEIGHTS HEALTHCARE & WELLNESS CENTER, Respondent.	No. 31-CA-129747 **BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

The Charging Party submits that the "Alternative Dispute Resolution Policy," more accurately described as a Forced Unilateral Arbitration Procedure (hereinafter "FUAP"), violates the Act.

Although we refer to the Board, we recognize that this Brief is submitted to the ALJ. Because we expect to resubmit this brief in large part, we use the term "the Board" where, in some places, it would be more accurate to state "the ALJ."

II. STATEMENT OF THE FACTS

Counsel for the General Counsel and Respondent stipulated to the relevant facts. The parties stipulated that the Respondent has "promulgated and maintained an alternative dispute resolution policy and agreement to be bound by Alternative Dispute Resolution Policy." Although paragraph 14(a) states that it is applicable "if signed by employees," it is clear that the employees are required to sign it if they have a dispute. This is not the typical "pre-dispute arbitration procedure." Rather, this is a mandatory arbitration procedure once a dispute arises.

The Alternative Dispute Resolution Policy states:

> The ADR Policy will be mandatory for ALL DISPUTES ARISING BETWEEN EMPLOYEES, ON THE ONE HAND, AND MONTECITO HEIGHTS HEALTHCARE & WELLNESS CENTRE AND/OR ITS RESPECTIVE EMPLOYEES AND OFFICERS (HEREINAFTER COLLECTIVELY THE "COMPANY"), ON THE OTHER HAND. Any disputes which arise and which are covered by the ADR Policy must be submitted to final and binding resolution through the procedures of the Company's ADR Policy.
>
> For parties covered by this Alternative Dispute Resolution Policy, alternative dispute resolution, including final and binding arbitration, is the exclusive means for resolving covered disputes (as defined below); no other action may be brought in court or in any other forum. This agreement is a waiver of all rights to a civil court action for a covered dispute; only an arbitrator, not a Judge or Jury, will decide the dispute.

This policy makes it clear that the arbitration procedure is mandatory. Employees must abide by this and sign the Policy if they have a dispute. This dissuades them from bringing up disputes more effectively than a pre-dispute procedure does because employees have to waive

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their Section 7 rights first before raising the dispute. This is more pernicious since they may only object to waiving their section rights in order to even raise a group or collective dispute.

III. THE FUAP IS GOVERNED BY THE BOARD'S DECISION IN *MURPHY OIL*

The Board's decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2013), governs. See many more recent cases such as *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016), and *AT&T Mobility Servs., LLC*, 363 NLRB No. 99 (2016). See also *Lewis v. Epic Systems*, No. 15-2997, ___ F.3d ___, 2016 WL 3029464 (7th Cir. 2016). For reasons discussed below, however, there are additional and related reasons why the FUAP is unlawful. We address those issues below. We particularly address the application of the Federal Arbitration Act, which we assume will be the Respondent's argument.[1] All of the issues arise from the allegations of the Complaint and the Answer.

IV. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT OF EMPLOYMENT

The FAA applies only where there is "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. § 2. Under the FAA, there must be some other "contract involving commerce."

The Supreme Court's seminal decision applying the FAA is expressly conditioned upon the existence of an employment contract:

> Respondent, at the outset, contends that we need not address the meaning of the § 1 exclusion provision to decide the case in his favor. In his view, an employment contract is not a "contract evidencing a transaction involving interstate commerce" at all, since the word "transaction" in § 2 extends only to commercial contracts. See *Craft*, 177 F.3d, at 1085 (concluding that § 2 covers only "commercial deal[s] or merchant's sale [s]"). This line of reasoning proves too much, for it would make the § 1 exclusion provision superfluous. If all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in ... interstate commerce" would be pointless. See, e.g., *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other

[1] Respondent has recycled arguments made in other cases and already rejected by the Board. It has not responded to the new arguments made in this case.

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> provisions in the same enactment"). The proffered interpretation of "evidencing a transaction involving commerce," furthermore, would be inconsistent with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), where we held that § 2 required the arbitration of an age discrimination claim based on an agreement in a securities registration application, a dispute that did not arise from a "commercial deal or merchant's sale." Nor could respondent's construction of § 2 be reconciled with the expansive reading of those words adopted in *Allied–Bruce*, 513 U.S., at 277, 279–280, 115 S.Ct. 834. If, then, there is an argument to be made that arbitration agreements in employment contracts are not covered by the Act, it must be premised on the language of the § 1 exclusion provision itself.

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113-14 (2001); See also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (an arbitration provision is severable from the remainder of the contract). See also *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995) (finding "a contract evidencing a transaction involving commerce" as a prerequisite to the application of the FAA).

There is no contract. The FUAP creates no contract. The Respondent has offered no evidence that it creates any contract of employment with any employee.

Assuming that the FUAP standing alone is a contract, that contract of employment does not affect commerce. See *infra*. The FAA applies to "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." There is no transaction here affecting commerce by the FUAP, assuming it is the only contract. There is no evidence in the record of how such contract can affect commerce.

The FAA does not apply absent proof of a contract. Respondent has failed to establish the existence of a contract.

Below, we show there is no transaction and no controversy. The reason, of course, is that no employee has presented a claim or transaction since the FUAP prevents the vindication of any right, and the employees have been thoroughly intimidated so that they have not exercised their Section 7 rights under the FUAP. Similarly, when an employer maintains an invalid "no solicitation" rule, there is no solicitation that the Act protects because employees are afraid of losing their jobs if they violate company rules.

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Below, we address the question of whether the FAA can apply to activity that does not affect commerce. The Board must address this issue. *Ex parte McCardle*, 74 U.S. 506, 514 (1868), and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-102 (1998).

V. THE BOARD MUST USE THIS CASE TO ADDRESS THE CONSTITUTIONAL ISSUE OF WHETHER THE FAA CAN BE APPLIED TO ACTIVITY WHICH DOES NOT AFFECT COMMERCE

A. INTRODUCTION

The Board has never addressed the question of whether the FAA may be applied to a FUAP without constitutional concerns under the Commerce Clause.[2] We address those issues below.

First, assuming there was an individual contract, there is no showing that such a contract that includes the FUAP, affects commerce. Second, we agree that an employment dispute itself is an activity, and the employer must show that the activity affects commerce. Third, the employer must show that the dispute resolution activity of individual arbitration or group arbitration affects commerce.[3] Fourth, there is no "transaction" triggering the FAA. Here, the employer cannot establish any constitutional basis to apply the FAA.

There is no inconsistency in the regulation of activity encompassed within the National Labor Relations Act and finding no commerce activity regulated by the FAA. The Act regulates the employer; the activity regulated is activity of employees and employers and labor organizations. In contrast, the FAA regulates only a targeted activity: arbitration. It does not purport to apply to employees, unions or employers and their "concerted activity for mutual aid or protection." Thus, there is no inconsistency. Here, the Commerce Clause issue is squarely placed. The commerce allegation in the complaint, which was admitted by the Respondent, is only that "Respondent purchased and received goods or services valued in excess of $5,000

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[2] In *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195 (2016), the Board avoided the issue by assuming that the FAA applies but applied *Murphy Oil*. See *Hobby Lobby*, footnote 3. The Administrative Law Judge agreed that the Federal Arbitration Act does not apply, finding that there is a constitutional problem under the Commerce Clause, as argued in this brief. It will have to face the issue either as an interpretation of the statute or as a matter of Commerce Clause application. See FAA.

[3] The dispute itself will not affect commerce; that is the claim by one party against the other. It is the process of resolving that dispute then that has to affect commerce.

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which originated outside of the state of California." That allegation is a minimal commerce allegation. There is no allegation that that purchase had anything to do with any employment dispute. With that very little commerce allegation, we proceed to analyze whether the FAA can apply.[4]

B. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT INVOLVING INTERSTATE COMMERCE

By its own terms, the FAA applies only to arbitration provisions that appear in a "contract evidencing a transaction involving commerce" (9 U.S.C. § 2), where commerce is defined as "commerce among the several States or with foreign nations." 9 U.S.C. § 1. The Supreme Court has held that under this language, "the transaction (that the contract evidences) must turn out, *in fact*, to have involved interstate commerce." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995) (emphasis in original).[5]

Thus, the FAA cannot be applied unless there is proof that the contract containing the arbitration provision involved a transaction that, in fact, affects interstate commerce. *Garrison v. Palmas Del Mar Homeowners Ass'n, Inc.*, 538 F.Supp.2d 468, 473 (D.P.R. 2008) ("[T]he FAA . . . only applies when the parties allege and prove that the transaction at issue involved interstate commerce") (citing *Medina Betancourt et al. v. Cruz Azul de P.R.*, 155 D.P.R. 735, 742–43 (2001)); *Shearson Hayden Stone, Inc. v. Liang*, 493 F.Supp. 104, 106 (N.D. Ill. 1980), *aff'd.*, 653 F.2d 310 (7th Cir. 1981) ("Interstate commerce is a necessary basis for application of the [FAA]").

In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Supreme Court found that the FAA did not apply did not apply to an employment contract between *Polygraphic Co.*, an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of the company's lithograph plant in Vermont. The Court found that the contract did not "evidence

[4] The allegation that "Respondent derived gross revenues in excess of $500,000" has nothing to do with commerce allegation because there is no allegation that any of that amount was derived from interstate commerce. It is solely to meet the Board's own self-imposed jurisdictional standards. *Siemons Mailing Serv.*, 122 NLRB 81 (1958). Robert Gorman & Matthew Finkin, *Labor Law Analysis and Advocacy*, Section 3.2 (JURIS 2013).

[5] The Court in *Allied-Bruce* also clarified that "the word 'involving' is . . . the functional equivalent of the word 'affecting.'" 513 U.S. at 273–74.

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a transaction involving commerce within the meaning of section 2 of the Act" because there was "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce." *Bernhardt*, 350 U.S. at 200-01.

Similarly, in *Slaughter v. Stewart Enterprises, Inc.*, No. C 07-01157MHP, 2007 WL 2255221 (N.D. Cal. Aug. 3, 2007), the court found that an "employment contract [did] not involve interstate commerce as required by the [FAA]" where an employee "was employed at a single location," "his employment did not require interstate travel," and "his activities while employed with defendants as well as the events at issue in the underlying suit were confined to California." See also *Ambulance Billings Sys., Inc. v. Gemini Ambulance Servs., Inc.*, 103 S.W.3d 507 (Tex. App. 2003) (holding FAA not applicable where services performed were confined to Texas).

There is no evidence that the transaction between the parties here involves interstate commerce. Employees who perform work in only one state are not engaged in activity that affects interstate commerce. Here, moreover, the sole allegation is that the Respondent maintains "an office and business in Newark, California." There is no claim that its business extends beyond Newark, California, and thus there is no evidence of any impact whatsoever on interstate commerce. Disputes that arise between any of its employees and Montecito may be simple, local disputes governed only by state law, like one missed meal period or rest break. Labor Code § 227.3. Some disputes might not even be economic, but just claims seeking to resolve personality issues or shift assignments or workplace duties. Whether this kind of local dispute is submitted to individual or group arbitration in its final stages will not make any difference for interstate commerce.[6] Yet, the FUAP purports to govern all this activity, no matter how trivial or local. Such a private arbitration agreement with an individual who does not perform work across state lines, does not transport goods across state lines, and is not seeking to enforce anything other than state law is not a contract evidencing a transaction involving interstate commerce.

[6] For an example of a dispute where no party asserted the FAA applied, see *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal.App.4th 74 (2014).

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The character of Montecito's business does not alter this conclusion. The relevant question here is whether the transaction *between the parties* has an effect on interstate commerce. The fact that one of the parties to the transaction is *independently* involved in interstate commerce does not bring every contract that party enters, no matter how trivial or local, within the reach of the FAA. Even though Polygraphic Co. was an employer that engaged in interstate commerce and operated lithograph plants in multiple states, the Supreme Court still determined that the arbitration agreement in the employment contract between Polygraphic Co. and Bernhardt did not involve interstate commerce. *Bernhardt*, 350 U.S. at 200-01. Even though Montecito is engaged in a health care business that may impact interstate commerce, an arbitration agreement between Montecito and an individual employee who does not perform work across state lines is still an agreement about how to resolve generally local disputes that does not involve interstate commerce. As the court observed in *Slaughter*, "[t]he existence of national companies . . . does not undermine the conclusion that the activity is confined to local markets. Techniques of modern finance may result in conglomerations of businesses. . . . [but] the reaches of the Commerce Clause are not defined by the accidents of ownership." *Slaughter v. Stewart Enters., Inc.*, No. C 07-01157MHP, 2007 WL 2255221, at *7 (N.D. Cal. Aug. 3, 2007).

Similarly, the purchase of $5,000 worth of materials and services from out of state does not transform the local nature of the agreement to arbitrate, since those purchases are not part of the arbitration agreement but are merely incidental to the transaction. They are not subject to the FUAP. See *Bruner v. Timberlane Manor Ltd. P'ship*, 155 P.3d 16, 31 (Okla. 2006) ("The facts that the nursing home buys supplies from out-of-state vendors . . . are insufficient to impress interstate commerce regulation upon the admission contract for residential care between the Oklahoma nursing home and the Oklahoma resident patient."); *Saneii v. Robards*, 289 F.Supp.2d 855, 860 (W.D. Ky. 2003) (The sale of residential real estate to an out-of-state purchaser had "no substantial or direct connection to interstate commerce," since any movements across state lines were "not part of the transaction itself" but merely "incidental to the real estate transaction"); *City of Cut Bank v. Tom Patrick Constr., Inc.*, 963 P.2d 1283, 1287 (Mont. 1998) (The purchase of

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insurance and materials from out of state did not impact court's decision that construction contract was a local transaction, not involving interstate commerce).

Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003), does not change the analysis. In that case, the Supreme Court held that the FAA could be applied in cases where there was no showing that the individual transaction had a specific effect upon interstate commerce, so long as "in the aggregate the economic activity in question would represent a general practice subject to federal control" and "that general practice bear[s] on interstate commerce in a substantial way." *Alafabco*, 539 U.S. at 56–57 (internal citations omitted). Under this standard, the Court found that the application of the FAA to certain debt-restructuring contracts was justified given the "broad impact of commercial lending on the national economy" and the facts that the restructured debt was secured by inventory assembled from out-of-state parts and that it was used to engage in interstate business. *Alafabco*, 539 U.S. at 57–58.[7] As other courts have observed, the logic used by the *Alafabco* court to justify the application of the FAA to a large financial transaction between a bank and a multistate manufacturer is not readily applicable to a private arbitration agreement covering claims that a local employment contract has been breached. *Slaughter v. Stewart Enters., Inc.*, No. C 07-01157MHP, 2007 WL 2255221, at *4 (N.D. Cal. Aug. 3, 2007) (distinguishing the "debt-restructuring contracts involving a manufacturer" at issue in *Alafabco* from a contract "for service type employment that occurred solely within the state"); see also *Bridas v. Int'l Standard Elec. Corp.*, 490 N.Y.S.2d 711, 717 n.3 (N.Y. Sup. Ct. 1985) (contrasting "an agreement based upon a multimillion dollar transfer of stock between an American and Argentine corporation" and the simple allegation of breach of an employment contract at issue in *Bernhardt*). Private arbitration agreements with employees who do not perform work across state lines, do not transport goods across state lines, and are not seeking to enforce anything other than state law are not contracts that involve interstate commerce in the way major debt-restructuring contracts did.

[7] Notably, private arbitration agreements on their own were not held to constitute a "general practice" that "bear[s] on interstate commerce in a substantial way." Instead, the Court relied on other characteristics of the transaction at issue to find the required connection to interstate commerce.

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The FAA cannot be stretched so far as to apply to any arbitration agreement between an individual and their employer just because the employer is, for other purposes, engaged in interstate commerce. Such a reading of the FAA would contravene the Supreme Court's decision in *Bernhardt*[8] and raise serious constitutional concerns.

C. THIS CASE IS BEYOND THE CONSTITUTIONAL REACH OF THE FAA SINCE THERE IS NO SHOWING THAT THE DISPUTES COVERED BY THE FUAP AFFECT INTERSTATE COMMERCE OR THAT THE ACTIVITY OF RESOLVING THOSE DISPUTES AFFECTS INTERSTATE COMMERCE

Under the Commerce Clause, Congress may only regulate "'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2578 (2012) (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)). Because the FAA was enacted pursuant to the Commerce Clause (*Perry v. Thomas*, 482 U.S. 483, 490 (1987)), it cannot constitutionally be applied here unless the regulated activity has this connection to interstate commerce.

The fact that the employer in this case is independently engaged in interstate commerce cannot supply the necessary connection to commerce because the FAA is not a regulation of the employer or the employer's business.[9] In *Sebelius*, the Supreme Court made it clear that Congress may only use its authority under the Commerce Clause "to regulate classes of *activities*," "not classes of *individuals*, apart from any activity in which they are engaged." *Sebelius*, 132 S.Ct. at 2591 (emphasis in original). Thus, in determining whether a regulation is permissible under the Commerce Clause, the court must not look at the class of individuals affected by the law, but at the actual activities that are being targeted by the law. Following this analysis, the Court ruled that the individual mandate could not be characterized as a regulation of

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[8] In *Bernhardt*, the Court explained that the FAA should be construed narrowly, so as not apply to an arbitration agreement between a multistate lithograph company and an employee who did not work across state lines. The Court warned that allowing the FAA to reach such transactions that did not affect interstate commerce would impermissibly "invade the local law field." *Bernhardt*, 350 U.S. at 202.

[9] The commerce stipulation refers to "purchases and receives . . . materials and services in excess of $5,000 directly from suppliers outside the State of California." There is nothing in this that affects employment disputes. See Stipulation Paragraph 10(d).

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individuals who would eventually consume healthcare, because that is just a class of individuals and not the actual activity regulated by the ACA. *Id*. at 2590-91. Similarly here, the FAA cannot be characterized as a regulation of employers engaged in interstate commerce, because that is just a class of corporate individuals and not the actual activity regulated by the FAA.

The actual activity regulated by the FAA is the resolution of disputes between private individuals. The FAA does not seek to regulate how the employer conducts its business or carries out its commercial activities. The FAA does not purport to regulate any activity other than the narrow aspect of dispute resolution in arbitration.[10] This is the actual activity Congress sought to regulate in the FAA, and such a law passed pursuant to the Commerce Clause cannot be constitutionally applied to the dispute resolution activity here unless this activity is connected to interstate commerce. See *Sebelius*, 132 S.Ct. at 2578.

The activity of resolving disputes between private individuals is not a "channel of interstate commerce," it is not a person or thing "in" interstate commerce, and whether the disputes covered by the FUAP here are resolved in individual or group arbitration does not "substantially affect interstate commerce." *Sebelius*, 132 S.Ct. at 2578 (quoting *Morrison*, 529 U.S. at 609). Many of the disputes covered by the FUAP do not implicate interstate commerce or have any substantial effect on interstate commerce. The FUAP is drafted in a way that would extend to any employment dispute. It could encompass a claim for one hour's pay, one missed meal period or rest break, or any other claim that has no impact whatsoever on interstate commerce. It would encompass a claim that was not economic at all, but just an effort to resolve personality issues or shift assignments or workplace duties. See JX 2I p. 12-13 and JX 2J p. 13. If two employees had a "conflict" that was not economic and asked for joint collective arbitration, that dispute would not have any impact on interstate commerce. All non-economic disputes that would have no impact on commerce are covered. Such local disputes governed by state contract law or state labor law lack any substantial connection to interstate commerce. If the dispute does not affect interstate commerce, regulation of the resolution of the dispute is not within the scope of the Commerce Clause, and the FAA cannot constitutionally apply. Whether a

[10] In contrast, the NLRA regulates dispute resolution through strikes and boycotts.

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dispute between Montecito and any of its employees is ultimately resolved in individual or group arbitration does not have an impact on any issue of interstate commerce. Because the employer has not shown that the disputes covered by the FUAP would affect interstate commerce or that the activity of resolving those disputes in individual or group arbitration would affect interstate commerce, the FAA cannot constitutionally be applied here.

Even though the FAA cannot constitutionally target the dispute resolution activity here,[11] the NLRA can constitutionally regulate dispute resolution activity between employers and their employees. This is not anomalous. The NLRA was passed pursuant to explicit Congressional findings that "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce." 29 U.S.C. § 151. The Supreme Court has explained that Section 7 of the NLRA embodies the effort of Congress to remedy this problem. *NLRB v. City Disposal Sys. Inc*., 465 U.S. 822, 835 (1984) ("[I]t is evident that, in enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). The NLRA can thus reach dispute resolution as a necessary part of its regulation of the employment relationship, designed to address the inequality in bargaining power that burdens interstate commerce. See *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 37 (1937) (recognizing that regulation of local, intrastate activity is permissible as a necessary part of a larger regulatory scheme). Unlike the NLRA, the FAA is not a larger regulation of employment and does not seek to change the fundamental ways employers and workers relate to each other in order to confront the labor strife that impedes interstate commerce. It seeks to regulate the private dispute resolution activity of individuals apart from its content or context, and this is impermissible.

[11] The courts in *Stampolis v. Provident Auto Leasing Co*., 586 F.Supp.2d 88 (E.D.N.Y. 2008), and *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), recognized that litigation is different from the activity of the entity involved in the litigation. See also *Rodriguez v. Testa*, 296 Conn. 1, 26, 993 A.2d 955, 969 (2010) (finding statute constitutional under Commerce Clause because it regulates industry, not litigation).

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Congress may not focus on the intrastate dispute resolution activities of private individuals apart from a larger regulation of economic activity. See *United States v. Lopez*, 514 U.S. 549, 558 (1995) (The Court has never declared that "'Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.' Rather, 'the Court has said only that *where a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.'" (emphasis in original) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968))). The Supreme Court has said that regulation of intrastate activity is permissible where it is one of the "essential parts of a larger regulation of economic activity" and the "regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. The relevant statutory regime here is the FAA. By its terms, the FAA addresses only individual transactions. 9 U.S.C. § 2 (applying the terms of the act to "a written provision in any maritime transaction or contract evidencing a transaction involving commerce"). Therefore, the regulatory scheme does not encompass wide sectors of economic activity in a general fashion but rather applies to individual transactions or contracts. Regulation of a local dispute that does not itself have any effect on interstate commerce is not a necessary part of the regulatory scheme. Similarly, failure to enforce arbitration provisions in purely intrastate contracts would not subvert the entire statutory scheme in the same way as the failure to regulate purely intrastate marijuana production would undercut regulation of interstate marijuana trafficking. *Gonzales v. Raich*, 545 U.S. 1, 26 (2005). Because regulation of the intrastate activity here is "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," it "cannot . . . be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. As a result, there are no constitutional grounds for applying the FAA to intrastate dispute resolution activity that bears only a trivial effect on interstate commerce.[12]

[12] Respondent may not argue that the language of the FUAP establishes commerce jurisdiction. There is no language that attempts to do so. In any case, the parties cannot confer federal jurisdiction by their agreement. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites*, 456

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Because the application of the FAA depends on the Commerce Clause, and because the forum in which this employment dispute is resolved does not have a substantial effect on interstate commerce, the FAA cannot be used to prohibit or interfere with protected concerted activity under the NLRA.

D. THERE IS NO "CONTROVERSY" SUBJECT TO THE FAA

The FAA applies to "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." There is no controversy here. No employee has asserted any claim.[13] No employee has asserted any claim because the FUAP is not an effective means of resolving individual claims. Group or class claims are prohibited. The FAA is only triggered by its terms when there is a "controversy." None exists here except whether the provision violates the Act. The absence of any such claim proves the chilling effect of the FUAP. None exists precisely because the FUAP is illegal. Like any unlawful employer maintained rule, the rule serves its purpose to prevent the lawful conduct. Such rules effectively chill employees' rights and thus serve their intended purpose. Thus, until a concrete controversy develops, the FAA cannot be applied.

Nor is there any evidence that any claim, if it were asserted, would affect commerce. Two employees could have a joint claim to a shift, or a job or to a vacation dispute. None of those claims would remotely affect commerce.

E. MONTECITO'S ANALYSIS, IF ANY, SHOULD BE REJECTED

Montecito may rely on *Alafabco, supra*. We have discussed it above. When the Supreme Court addressed the Commerce Clause question in *Alafabco*, it notably did not find that private arbitration agreements on their own were a "general practice" that "bear[s] on interstate commerce in a substantial way." The Court instead relied on other characteristics of the transaction at issue — a multimillion dollar debt restructuring contract between a bank and a multistate manufacturer — to find the necessary connection to interstate commerce. Here, there is no evidence that individual or group "disputes" affect commerce. Montecito's potential

U.S. 694, 702 (1982).

[13] The dispute over whether the FUAP violates the NLRA is excluded from the FUAP and cannot be the basis to establish a controversy.

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argument may be that as long as its nationwide retail business affects commerce, any employment dispute must also affect commerce.[14] That statement of Montecito's potential position demonstrates that it is not logical.

F. SUMMARY

In summary, the National Labor Relations Act may regulate the activities of this employer because of the impact on commerce. No one disputes that. The Federal Arbitration Act, however, regulates the specific activity of dispute resolution in the form of arbitration, and that activity does not affect commerce within the Commerce Clause. Alternatively, the FAA regulates only employment disputes that affect commerce. Further, there is no contract subject to the FAA nor is there any controversy subject to the FAA.

The Board must address this constitutional issue. It cannot do so by applying the doctrine of constitutional avoidance. Here, Montecito will rely for its core argument on the FAA. Either it applies or it doesn't. The Board cannot duck and weave and avoid.[15]

VI. THE APPLICATION OF THE FEDERAL ARBITRATION ACT CANNOT OVERRIDE THE IMPORTANT PURPOSES OF OTHER FEDERAL STATUTES THAT ALLOW EMPLOYEES TO SEEK RELIEF FROM THE FEDERAL GOVERNMENT FOR THE BENEFIT OF THEMSELVES AND OTHER WORKERS

The Board must address directly the question of whether the Federal Arbitration Act may trump the application of the National Labor Relations Act as to other federal statutes that allow whistle-blowing or independent administrative remedies. As the Board correctly found in *Murphy Oil USA, Inc.*, *supra*, there are important purposes underpinning Section 7 that are not addressed by the Federal Arbitration Act. That equally applies to claims that employees can

[14] Thus, the aggregation argument based on *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), and *E.E.O.C. v. Waffle House*, 534 U.S. 279 (2002), is inapposite. Neither of these cases involved challenges based on the reach of the commerce power, and so the Supreme Court did not address the statutory question of whether the arbitration agreements in these cases were part of contracts evidencing transactions involving commerce or the constitutional question of whether the FAA could constitutionally be applied in such situations.

[15] See *Hobby Lobby*, *supra*, 363 NLRB No 195.

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make under other federal statutes regarding workplace issues.[16] Here, we point out that the FUAP provision effectively undermines those other federal statutes. Thus, the restriction found in the FUAP, that any the worker may only have "my individual claims" heard, would interfere with other federal statutory schemes, which envision and, in some cases, require remedies that will affect a group. The Board has been admonished by the Supreme Court in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), that it must respect other federal enactments.[17] Here, the Board should recognize that there are many federal statutes that allow group, collective or class claims or even individual claims that affect a group. The FAA cannot be used to defeat the purposes of those statutes.

Employees have the right to bring to various federal agencies all kinds of issues that affect them and other workers. Under these statutes, they have the right to seek relief from those agencies for their own benefit as well as for the benefit of other workers or employees of the employer. Those remedies can involve government investigations, injunctive relief, and federal court actions by those agencies, and debarment from federal contracts, workplace monitoring and many other remedies that would be collective and concerted in nature.

In effect, the FUAP would prohibit an employee from invoking on his/her behalf, as well as on behalf of other employees, protections of these various federal statutes. It would prohibit the agency or the court from remedying violations of the law that the agency or court would be empowered, if not required, to remedy.

The Congressional Research Service has identified forty different federal laws that contain anti-retaliation and whistleblower protection. See Jon O. Shimabukuro, et al., Cong. Research Serv. Report No. R43045, *Survey of Federal Whistleblower and Anti-Retaliation Laws* (April 22,

[16] We emphasize that what is not at issue is the individual right of employees to file claims of any kind with federal agencies or in federal court. Where the action is not concerted and not for mutual aid or protection, the NLRA is not implicated. It is only when the action is concerted and for mutual aid or protection that NLRA Section 7 protection is triggered. This discussion assumes that an employee may invoke these other federal laws to benefit herself and other employees. Thus, the resort to the court or agencies or arbitration must satisfy the Board's application of *Meyers Industries, Inc*. 281 NLRB 882 (1986). We do not, however, believe *Meyers Industries* survives recent board cases, and the board should return to the doctrine of *Alleluia Cushion Co.*, 221 NLRB 999 (1975). *Meyers* is fundamentally inconsistent with *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014).

[17] Any assertion by Respondent that the FAA trumps the NLRA is another example.

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2013), *available at* http://fas.org/sgp/crs/misc/R43045.pdf. These are all laws that relate directly to workplace issues. Nothing in the Federal Arbitration Act preempts the application of other federal laws. Some examples are mentioned below.

The federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*., allows for the District Courts to grant injunctive relief to "restrain violations of [the Act]." See 29 U.S.C. § 217.[18] The application of the FUAP would prevent an individual or a group of individuals from seeking injunctive relief that would apply to all employees or apply in the future to themselves and other employees. It would undermine the purposes behind the FLSA to allow for such injunctive relief.[19]

The same is true with respect to ERISA, 29 U.S.C. § 1001, *et seq*. The FUAP would prohibit an employee from going to court with respect to a claim involving a benefit covered by ERISA, even though the statute expressly allows for equitable relief. 29 U.S.C. § 1132(a)(1) and (3). And as noted below, by extending this expressly to "its employee benefit and health plans," the FUAP violates ERISA.

The FUAP would prevent employees from bringing a complaint to OSHA seeking investigation and correction of worksite problems affecting all employees where action after the investigation would be necessary.

The FUAP would prevent an employee from filing an EEOC charge that could lead to EEOC court action seeking systemic or class wide relief.[20] It would prevent the employees from participating in systemic charge investigations. 42 U.S.C. Section 2000e-8(a). Commissioners

[18] It is not contradictory to refer to the rights under federal statutes and raise the question of commerce jurisdiction with respect to the FAA. The difference is that the FAA regulates dispute resolution or the employment dispute, not the business or commerce activity of the employer

[19] Even a claim by an employee that she was not paid for overtime after 40 hours, as required by the FLSA, would not affect commerce. The claim could be based on the promise in the handbook to pay overtime. And because the worker was prohibited from bringing the claim in court, the advancement of that claim for a few dollars of overtime would not affect commerce for FAA purposes.

[20] The reference in the policy allowing the filing of charges but invoking the FUAP if there is court action doesn't change this analysis. The policy says "Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge." This is singular, so no joint or class or group charges can be filed. Moreover, it precludes group charges once the administrative remedy has been exhausted. It would prohibit a charging party from filing a Petition for Review under 29 U.S.C. Section 160(e).

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may file EEOC charges on their own (42 U.S.C. Section 2000e-5(b)), which the FUAP would prohibit.

The FUAP would prevent employees from bringing unlawful immigration practices to the attention of the Office of Special Counsel. (http://www.justice.gov/crt/about/osc/.)

It would prohibit anonymous actions, which are permitted under some circumstances. *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir.2000).

The FUAP would prohibit actions under the federal False Claims Act. (http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.) An employee could not, for example, claim that on a federal Davis-Bacon project, the employer made false claims for payment while not paying the prevailing wage. An employee could not claim, along with others, that the employer is overcharging on a government contract. See *United States v. Circle C Constr.*, 697 F.3d 345 (6th Cir. 2012). This kind of litigation serves an important public purpose but would be foreclosed by the FUAP. This kind of claim is necessarily brought as a group action, since the relief sought includes a remedy for the underpayment of a group of workers.

The FUAP allows the filing of individual claims with certain agencies but does not allow group claims with those agencies.

The FUAP would prohibit an employee from bringing a claim to the Department of Labor that the employer violates the provisions of the Fair Labor Standards Act regarding employment of minors unless the individual were herself an under-aged minor.

The FUAP, by its terms, undermines the enforcement of these federal statutes, which envision private efforts to enforce their purposes for all employees and for the public interest.

There is no escaping the conclusion that there are a multitude of federal laws that govern the workplace. The FUAP prohibits an employee acting collectively or to benefit others[21] from seeking assistance before those agencies and in court to effectuate the purposes of those statutes. The FUAP would prohibit the employee from doing so for the benefit of employees acting

[21] The FUAP would prevent an employee from seeking assistance of others to proceed collectively. An employee could be disciplined for seeking to invoke a collective action on the theory that this would violate the company policy contained in the FUAP.

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collectively. The purposes of those statutes would include not only individual relief for the employee himself or herself, but also relief that would protect the public interest in enforcement of those statutes.[22]

For these reasons, the FUAP itself is invalid, not only because it would prohibit an employee from seeking concerted relief with respect to other federal statutes, but also because it would prohibit the employee from seeking relief that would benefit other employees. The FAA cannot serve to interfere with the enforcement of other federal statutes. As we show, this conflict is particularly heightened with the RFRA, which expressly overrides other federal statutes. The Board should expressly rule that the application of the FAA interferes with important policies under other federal statutes.

VII. THE FUAP WOULD PROHIBIT COLLECTIVE ACTIONS THAT ARE NOT PREEMPTED BY FAA UNDER STATE LAW

This issue arises because the FUAP applies in California.[23] The California Supreme Court has ruled that an arbitration agreement cannot foreclose application of the Private Attorney General Act, Labor Code § 2699 and 2699.3. See *Iskanian v. C.L.S. Transp.*, 59 Cal.4th 348 (2014), *cert. denied*, _ U.S. __(2014). See also *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015).

There are numerous other provisions in the Labor Code that permit concerted action. See, e.g., *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), *cert. denied*, 134 S.Ct. 2724 (2014) (arbitration policy cannot categorically prohibit a worker from taking claims to Labor Commissioner, although state law is also preempted from categorically allowing all claims to proceed before the Labor Commissioner in the face of an arbitration policy).

The FUAP would interfere with the substantive right of the California Labor Commissioner to enforce the wage provisions of the Labor Code. See, e.g., Cal. Lab. Code § 217.

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[22] The U.S. Supreme Court has not addressed this issue in any employment arbitration cases since each case has been an individual claim without the argument that the claim serves any public purpose. *Iskanian v. C.L.S. Transp.*, 59 Cal.4th 348 (2014), *cert. denied*, _ U.S. _ (2014), is based on that principle.

[23] The burden is on the employer to show that there is no other state law that would apply in the same way.

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There are, additionally, various provisions in the California Labor Code that allow only the Labor Commissioner to award penalties or grant other relief. The enforcement of the FUAP would prevent employees from collectively going to the Labor Commissioner seeking these penalties for themselves or other employees. It would foreclose an employee from asking the Labor Commissioner to seek remedies for a group of employees. See, e.g., Cal. Lab. Code § 210(b) (allowing only the Labor Commissioner to impose specified penalties); Cal. Lab. Code § 218 (authority of district attorney to bring action); Cal. Lab. Code § 225.5(b) (penalty recovered by Labor Commissioner). IWC Order 16, Section 18(A)(3), *available at* https://www.dir.ca.gov/iwc/IWCArticle16.pdf. Employees could not collectively seek enforcement of these remedies because the FUAP prohibits them from bringing claims collectively to that agency.

The recently enacted sick pay law may only be enforceable by the Labor Commissioner. See Cal. Lab. Code § 245 (effective July 1, 2015). The FUAP would foreclose enforcement of this new law. Individuals or groups of individuals do not have the right to enforce the law in court or before an arbitrator. For purposes of this case, it would foreclose concerted enforcement of the new law since the arbitration process would not be authorized to enforce a law given exclusively to the Labor Commissioner. It would prevent other public officers from enforcing state law for a class or group upon complaint by employees. Cal. Bus. & Prof. Code § 17204.

Additionally, under state law, there are a number of whistleblower statutes just as there are under federal law. The FUAP would prohibit employees from invoking those statutes for relief that would affect them as well as others. The Labor Commissioner lists thirty-three separate statutes that contain anti-retaliation procedures. See http://www.dir.ca.gov/dlse/FilingADiscriminationComplaint1.pdf.

California has strong statutory protection for whistleblowers. See Cal. Lab. Code § 1101 and 1102. The FUAP defeats the purposes of those statutes that allow groups to bring claims forward to vindicate the public purpose animating those provisions.

Just as the California Supreme Court held in *Iskanian*, there are important public purposes animating these statutes that allow employees to seek assistance from either state agencies or the

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court system. To prevent employees from seeking relief for other employees in the workplace would effectively deprive them of substantive rights guaranteed by state law. The FAA does not preempt such state laws. See *Iskanian, supra*.

The Board must address the question of the application of *Iskanian* and similar doctrines. The FUAP is invalid because it prohibits the exercise of this important state law right, which serves an important public purpose. Once again, the burden is on the employer to prove that the FUAP does not interfere with other non-preempted state law.

VIII. THE FUAP UNLAWFULLY PROHIBITS GROUP CLAIMS THAT ARE NOT A CLASS ACTION OR A REPRESENTATIVE ACTION OR AS A PRIVATE ATTORNEY GENERAL OR AS A REPRESENTATIVE OF OTHERS OR OTHER PROCEDURAL DEVICES AVAILABLE IN COURT OR OTHER FORA

The cases focus on the rights of employees to use collective procedures in courts and other adjudicatory fora. Here, we make the point that employees have the right to bring their collective disputes together as a group. Or a group or individual can represent others to bring a group complaint. The FUAP prohibits such group claims or consolidation.[24] It expressly prohibits a "class action, or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claim of others." Presumably, it includes collective actions since this is a form of consolidating claims.

This is an essential point here. It responds to the repeated dissents of Member Miscimarra and former Member Johnson. This point responds to arguments likely to be made by the employer. These are claims brought by two or more employees. There is no need to invoke class action, collective action or any procedural form of collective actions. It is just two or more employees bringing the same claim and assisting each other. Alternatively, it can be two or more employees bringing a complaint that would require the participation of other employees and would affect them. The Board needs to make it clear that such group claims stand apart from class actions, collective actions, and representative actions that invoke court adopted procedures.

[24] As to this theory, the Board does not have to address the argument made in those dissents that employees do not have the right to invoke the formalized procedures available in court such as class actions or collective actions.

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IX. THE FUAP IS INVALID AND INTERFERES WITH SECTION 7 RIGHTS TO RESOLVE DISPUTES BY CONCERTED ACTIVITY OF BOYCOTTS, BANNERS, STRIKES, WALKOUTS AND OTHER ACTIVITIES

The FUAP is invalid because it makes it clear that the employees are limited to the arbitration procedure to resolve disputes. It applies "in the event a dispute should arise," not just to disputes that could be brought in a court or before any agency. It governs "employment disputes." This would foreclose the employees from engaging in strikes or boycotting activity, expressive activity or other public pressure campaigns. This is a yellow dog contract. Here, employees are forced to agree that they shall use only the arbitration procedure to resolve disputes with the employer, and thus they would be violating the arbitration procedure if they were to use another more effective forum, such as a public protest or a strike. It prohibits all forms of concerted activity because it requires that employees use the arbitration procedure. Any employee who violates this rule would be subject to discipline just as he/she would be for violating any other employer rule. This is a fundamentally illegal forced waiver of the Section 7 right to engage in lawful economic activity, including boycotting, picketing, striking, leafleting, bannering and other expressive activity. That language is contained in the FUAP.[25]

That concerted activity could certainly include seeking a Union's assistance in negotiating a better arbitration provision or in invoking the FUAP. Fundamentally, it also would make it unlawful to engage in Union activities such as a strike, picketing, bannering or other concerted activity. The Board's recognition that the FUAP is an unlawful yellow dog contract under the Norris-LaGuardia Act, reaffirms that point but does not go far enough. If the FUAP is unlawful under the Norris-LaGuardia Act and Section 7, it is unlawful because it prohibits other concerted

[25] The language in the FUAP that an employee "will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on a class, collective, representative or joint action" does not save the FUAP. The Board has ruled that such exculpatory clauses do not explain to a worker what she can do under the Act. Moreover, this is ambiguous as to whether it is limited to "challenging" the FUAP or taking direct economic action to resolve the controversy between the employees and the Respondent.

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means of resolving disputes. Employees are not limited to bringing claims concertedly before courts or agencies.[26] They can do so by direct action.[27]

The FUAP is an unlawfully imposed no-strike, no boycott, no bannering, no leafleting and no concerted activity ban. It is the worst form of a yellow dog contract.

X. THE FUAP UNLAWFULLY PROHIBITS CONSOLIDATING

This FUAP has the specific reference to prohibiting "consolidating." This undefined ambiguous term would prohibit even one employee from acting jointly with another employee to help each other bring individual claims. It would prohibit them from referring to other claims or invoking the doctrine of *res judicata* or *collateral estoppel*. To the extent it is ambiguous, it must be construed against the employer.

XI. THE FUAP UNLAWFULLY PROHBITS ONE EMPOYEE FROM REPRESENTING ANOTHER OR OTHER EMPLOYEES

The FUAP prohibits one employee from acting as the "representative of others." If the employee is a union representative, this is unlawful. If the employee is an attorney, this is unlawful. This is unlawful in administrative hearings where a non-lawyer can represent others. It would prohibit an employee from filing an NLRB charge for someone else.

XII. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT SALTING AND APPLIES AFTER EMPLOYMENT ENDS

The FUAP would extend to someone who became employed for the purpose of salting, improving working conditions and organizing since it would restrict his/her right to engage in concerted activity and organize. It would prohibit the salt from assisting other employees in pursuing collective claims. Moreover, the FUAP purports to govern even after an employee quits or is fired. If the employee chooses to quit because of miserable working conditions or to organize, she is barred from acting collectively. Respondent cannot bar an employee who has

[26] Surely, every employer would rather force employees to resolve disputes in the least friendly fora: the courts and arbitration. The Norris-LaGuardia Act and the NLRA protect the right of employees to settle disputes in the most effective manner: collective action in the streets. See *On Assignment Staffing Servs.*, 362 NLRB No. 189 (2015).

[27] See below where we address the need to overrule *Lutheran Heritage-Village Livonia*, 343 NLRB 824 (1998). Under current Board law, however, this ambiguity should be construed against the employer. See *Murphy Oil, supra*, at *26 and other cases cited below.

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terminated any employment agreement from acting collectively on behalf of either current employees or other former employees.[28]

XIII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT FORECLOSES GROUP CLAIMS BROUGHT BY A UNION AS A REPRESENTATIVE OF AN EMPLOYEE OR EMPLOYEES

The FUAP prohibits a union that represents an unrepresented employee from representing that employee in the arbitration procedure. That is, it would prohibit a union from acting on behalf of an employee, not as the collective representative of the group, but rather as the representative of the individual employee. It would also prevent a union from acting as the minority representative or members-only representative of an employee or group of employees. Such activity is protected. It would prevent a union from acting on behalf of a group of employees.

The FUAP prohibits a union that is recognized or certified from representing employees.

The FUAP would prevent a union, as the representative of its members, or non-labor organization worker center from representing its members where authorized under state or federal law. See *Soc. Servs. Union, Local 535 v. Santa Clara Cty*., 609 F.2d 944 (9th Cir. 1979) (Union may act as representative of its members in class action); *United Food & Commercial Workers Union Local 751 v. Brown Group., Inc*., 517 U.S. 544 (1996) (union has associational standing on behalf of its members); *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457 (N.D. Cal. 1983); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274 (1986).[29] See *Bhd. of Teamsters v Unemployment Insurance Appeals Bd.*, 190 Cal.App.3d 1517 (1987) (California law allows union to have standing on behalf of its members).[30]

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[28] California prohibits non-compete clauses. This would conflict with such provisions.

[29] It would prohibit an employee from joining a non-labor organization that brought litigation against the employer on issues affecting working conditions. An employee could not join a worker center, for example, that brought claims by other employees.

[30] The California Labor Code expressly allows representatives such as unions to raise claims. See Labor Code Section 1198.5(b)(1). It would foreclose a union from bringing a claim as a person under any federal statute or state statute that allows any person to bring a charge or complaint before an agency.

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XIV. THE FUAP IS UNLAWFUL BECAUSE IT IMPOSES ADDITIONAL COSTS ON EMPLOYEES TO BRING EMPLOYMENT RELATED DISPUTES

This FUAP contains a fundamental flaw in that it would require an employee to pay arbitration costs. Thus, it necessarily increases the costs of employees who bring claims concerning working conditions. This is particularly a flaw in California, where the Berman Hearing process is free to an employee. Thus, if one employee sought to bring an issue to the Labor Commissioner on behalf of others, that employee would incur no costs. The same claim brought in arbitration would incur the arbitration costs of at least the arbitrator and other associated costs. See Labor Code § 98. In effect, a penalty is imposed on the employee because he or she has to pay the arbitration costs where there is a free procedure under the Labor Commissioner system under Labor Code § 98. The Act does not permit an employer to force employees to pay anything, not one cent, to exercise their Section 7 rights. Because employees can bring concerted claims without cost to the Labor Commissioner, the FUAP is unlawful.

Furthermore, employees cannot share expert witness fees, deposition costs, copying costs, attorney's fees and many other costs associated with bringing and pursuing claims. Bringing them as a group includes sharing those costs. Sharing costs is concerted activity. Thus, the FUAP expressly penalizes workers by increasing their costs in violation of Section 7.

The FUAP would prevent a federally recognized Joint Labor Management Committee from pursuing claims. See 29 U.S.C. § 175a.[31]

On all these grounds, the FUAP is unlawful.

XV. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT AN EMPLOYEE OF ANOTHER EMPLOYER FROM ASSISTING A MONTECITO EMPLOYEE OR JOINING WITH A MONTECITO EMPLOYEE TO BRING A CLAIM

Separately, an employee of any other employer is also an employee within the meaning of the Act. *Eastex v. NLRB*, 437 U.S. 556 (1978). Such other employee could assist an employee of Montecito or join with a claim brought by a Montecito employee. The rights of all other employees of other employers are violated by the FUAP independently of whether it violates just

[31] It is not contradictory to refer to the rights under federal statutes and raise the question of commerce jurisdiction with respect to the FAA. The difference is that the FAA regulates dispute resolution or the employment dispute, not the business or commerce activity of the employer

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the Section 7 rights of Montecito employees. The FUAP cannot apply to an employee of another employer, nor can it prohibit a Montecito employee from joining with an employee of another employer.

Furthermore, it would prohibit employees of Montecito from bringing group complaints with employees of "owners., directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans," as described in the FUAP even though those other persons are not parties to the FUAP.[32]

XVI. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT APPLIES TO PARTIES WHO ARE NOT THE EMPLOYER BUT MAY BE AGENTS OF THE EMPLOYER OR EMPLOYERS OF OTHER EMPLOYEES UNDER THE ACT

The FUAP is invalid because it applies to other employers. The FUAP extends to disputes with the Company and "any of its respective employees or officers." None of them is bound to arbitrate claims against the employee except the Company itself. It does not bind its "owners, directors, officers, managers, employees, agents and parties affiliated with its employee benefit and health plans" and so on. Each of these persons could be an employer or joint employer within the meaning of the Act. Yet, the employee is bound to arbitrate claims against those individuals where those claims arise out of wages, hours and working conditions to the extent they are the employer.

There are many wage and hour statutes, including the Fair Labor Standards Act, the California Fair Employment and Housing Act and provisions of the Labor Code, that can impose joint liability.[33] Thus, the FUAP prohibits Section 7 activity against parties who are not the employer and thus is overbroad and invalid. This would affect the employees' right to bring claims against joint employer relationships. See *Browning-Ferris Indus.*, 362 NLRB No. 186 (2015).

[32] It is not "mutual" and is invalid for this reason.

[33] In addition, this effort to limit claims against benefit plans is prohibited by ERISA, 29 U.S.C. § 1140, since it interferes with the rights of employees to bring claims against benefit plans.

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Moreover, there is no contract between any employee and these third parties. So the FAA cannot apply. The FUAP cannot apply to non-parties to any agreement with the employees. *First Options v. Kaplan*, 514 U.S. 938 (1995).

XVII. THE FUAP VIOLATES ERISA

The FUAP violates ERISA. Because it extends to benefit plans, it runs contrary to the Department of Labor regulation prohibiting mandatory arbitration. See 29 C.F.R. § 2560.503-1(c)(4); see *Snyder v. Fed. Insurance Co.*, 2009 WL 700708 (S.D. Ohio 2009) (denying arbitration relying on the DOL regulation). We recognize that a plan may require exhaustion of its remedies including arbitration, but that's only a function of exhausting the plan arbitration clause prior to bring a court action. See *Chappell v. Laboratory Corporation America*, 232 F.3d 719 (2000); see also *Engleson v. Unum Life Ins. Co.*, 723 F.3d 611 (6th Cir. 2003); see also 29 U.S.C. § 1133.

Additionally, this language violates the right of employees to invoke procedures under the employee benefit plans, rather than under this FUAP.[34] The language on page 2 excluding claims brought under "a team member benefit plan" does not exclude any benefit that is not expressly subject to arbitration. The burden is on Respondent to show all such claims would be subject to such a procedure. ERISA requires that there be an arbitration procedure to bring claims against benefit plans. This effectively preempts ERISA by requiring employees to use this procedure rather than the procedure adopted by the benefit plans. See 29 U.S.C. § 1133.

XVIII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT RESTRICTS THE RIGHT OF WORKERS TO ACT TOGETHER TO DEFEND CLAIMS BY THE EMPLOYER AGAINST THEM

Employees have the right to band together to defend against claims made by the Employer or other employees. Although an employee might choose to refrain from concerted activity against the employer, that employee may wish to engage in joint activity where there are joint or related claims against several employees.

[34] Respondent, by imposing this arbitration requirement, has become the administrator of the plans and a fiduciary to the plans.

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The FUAP imposes a very heavy burden on employees who may be jointly the subject of a claim by the company against them. Under the FUAP, they could not jointly defend themselves but would have to defend themselves individually in separate actions. The employer may have claims against multiple employees, such as overpayments for wages or breach of confidentiality provisions. There may be cross-claims, counter-claims, interpleader or claims for indemnification. There may be claims for declaratory relief against the employer or other employees. The employees are entitled to defend such claims or pursue such claims jointly and concertedly.[35] The FUAP is facially invalid since it prohibits group action to defend against claims jointly.[36]

XIX. THE FUAP IS UNLAWFUL UNDER THE NORRIS-LAGUARDIA ACT

The Norris–LaGuardia Act, 29 U.S.C. § 101, *et seq*., states that, as a matter of public policy, employees "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of . . . representatives [of their own choosing] or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[37] 29 U.S.C. § 102. The Act declares that any "undertaking or promise in conflict with the public policy declared in section 102 . . . shall not be enforceable in any court of the United States." 29 U.S.C. § 103. The FUAP plainly interferes with the rights guaranteed by this federal law. The FAA does not eliminate the rights guaranteed by the Norris-LaGuardia Act. This argument is fully explored in the law review article written by Professor Matthew Finkin, "The Meaning and Contemporary Vitality of the Norris-LaGuardia Act," 93 Neb L. Rev 1 (2014). He forcefully argues that an agreement to waive collective actions is a quintessential

[35] The FUAP specifically prohibits "consolidating a covered claim with the claims of others." Joint Exhibit # 2 at page 1. This would be a useful procedure for employees to concertedly defend claims brought against them by the employer.

[36] For example, employees would have to hire lawyers who would cost more for individual representation. Employees could not share the costs of expert witnesses, document production, depositions, etc. The simple fact that individual actions increase the costs on the workers makes it a penalty and violates Section 7.

[37] The commerce standard for the Norris-LaGuardia Act is much broader than the "transactional" standard of the FAA. See 29 U.S.C. Section 113 (defining broadly labor dispute).

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yellow dog contract prohibited by the Norris-LaGuardia Act. We repeat this here to reinforce our arguments. See *On Assignment Staffing, supra.*

XX. THE FUAP IS INVALID BECAUSE IT IS UNCLEAR AS TO WHAT IT COVERS, AND THEREFORE IT IS OVERBROAD; THE DECISION IN *LUTHERAN HERITAGE VILLAGE-LIVONIA* SHOULD BE OVERRULED; THE BOARD HAS NOW EFFECTIVELY OVERRULED *LUTHERAN HERITAGE VILLAGE-LIVONIA* AND SHOULD EXPRESSLY DO SO

A. INTRODUCTION

The FUAP is ambiguous as to what it covers. For example, one disputed area is whether this would encompass claims before the Labor Commissioner under California Labor Code § 98. Although the FUAP does not preclude an employee "from filing a charge with a state or federal administrative agency . . ." it forecloses such claims in court. It is unclear whether the agency could pursue the claim in court. This is exactly the question faced by the California Supreme Court in *Sonic-Calabassas, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), *cert denied*, 134 S.Ct. 2724 (2014). It is not clear whether that important procedure under California law is included or excluded. For example, if the employee won before the Labor Commissioner and the employer wanted to appeal, would it have to go to Court or to arbitration? Or could the Labor Commissioner Order, Decision or Award be enforced in court? See Labor Code Section 98.2.

It is not clear what rights are asserted to be protected under Section 7. It is not clear who pays the costs. It is not clear whether other persons may initiate court or administrative claims. It is not clear whether employees can strike or have to use the FUAP.

Recently, the Board has reemphasized that, where language "creates an ambiguity," that ambiguity "must be construed against the Respondent as the drafter of the [rule]." *Murphy Oil U.S.A., Inc., supra*, 361 NLRB No. 72 at *26 (2014). *Prof'l Janitorial Serv.*, 363 NLRB No. 35, n.8 (2015), and *Caesars Entm't*, 362 NLRB No. 190 at *1 (2015). The Board relied upon its prior decision in *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999) in reaching this conclusion. Thus, since the FUAP is unclear, it should be construed against the company to prohibit all forms of concerted activity and thus is overbroad. Additionally, this case illustrates precisely why the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), should be overruled.

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B. THE BOARD SHOULD DISCARD *LUTHERAN HERITAGE VILLAGE-LIVONIA* TO THE TRASH HEAP OF DISCREDITED DECISIONS

The Board should return to the rule established in *Lafayette Park Hotel*, 326 NLRB 824 (1998). The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an unworkable and unreasonable doctrine for evaluating when employer-maintained rules are unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*, 326 NLRB 824 (1998). See also *Ark Las Vegas Rest. Corp*., 343 NLRB 1281, 1283 (2004) (any ambiguity in a rule that restricts concerted activity can be construed against the employer).

The Board's application of the *Lutheran Heritage Village-Livonia* rule ignores the basic concept that if some employees can read the language as interfering with Section 7 rights, then there is a violation because some employees have had their rights unlawfully interfered with or restricted. The fact that someone may be able to read the rule as not reaching Section 7 activity allows employers to chill the Section 7 rights of those who reasonably read the rule as reaching Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest in such activity. They may assert their right to "refrain from such activity." But those who choose to engage in such activity have their conduct chilled, if not prohibited. The Board's rule is a form of tyranny of some or a few over the rights of those who want to engage in Section 7 activity. If an employer's action interferes with the Section 7 rights of one employee, the conduct violates the Act. The *Lutheran Heritage Village-Livonia* rule assumes that conduct violates the Act only if many, and probably a majority, would have their rights violated. Such a rule should be discarded and thrown into the trash pile of discredited doctrines.

In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

> Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

Lutheran Heritage Village-Livonia, 343 NLRB at 647.

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This doctrine has created confusion and uncertainty in the application of rules. Moreover, it is an illogical statement. If the "rule could be interpreted that way [to prohibit Section 7 activity]," the rule should be unlawful. We are not suggesting that if that "reading is unreasonable," it should violate the Act. Only if the rule can be reasonably read to interfere with Section 7 activity should it be found unlawful. This is the rule of ambiguity. If the rule is ambiguous and could reasonably be read by some to interfere with or prohibit Section 7 activity, it should be unlawful. Here, this is heightened by the fact that, as illustrated above, the Employer's Chief Executive Officer cannot explain the scope of the FUAP. If he can't do so, no employee can easily construe it. In fact, we believe that in most cases, if you ask the president of the company to explain their corporate rules, they can't explain how they would apply in most common circumstances where Section 7 rights are at issue. This case incisively illustrates why *Lutheran Heritage Village-Livonia* should be overruled.

The Board's prior rule in *Lafayette Park Hotel*, cited above, is to construe any ambiguity against the employer. This has been the consistent application in many areas of law, including the Board's application of employer-created rules. After all, the employer has control over what it says, and it can implement language that is not vague or ambiguous. This is inherently true of most employer rules, but quite clear in this case. Only the employer benefits from chilling and restricting Section 7 activity. Recently, the Board seemed to have made it plain in *Murphy Oil*, *supra*, where there is an ambiguity it would be construed against the Employer.

A worker is not at fault if the employer makes a statement that is ambiguous and could affect or chill Section 7 rights. The employer statement should be construed against the employer. Where there is any reasonable interpretation of the rule that could interfere with Section 7 activity, the rule should be deemed unlawful. Employers will necessarily make rules ambiguous to chill such activity unless required to make them clear. Ambiguity gives them wider discretion and more power. Such ambiguities necessarily coerce some employees.

This interpretation has become one by which the Board ignores the illegal yet reasonable interpretation as long as there is a reasonable interpretation that is not unlawful. The Board has turned the law on its head; where there is a reasonable interpretation that the rule does not affect

Section 7 rights, which only a few employees may apply, it makes no difference that most or many of the employees would apply a reasonable interpretation that the rule prohibits Section 7 activity.

Put in other words, the burden should be on the drafter and maintainer of a rule to prove that "no employee," not a single one, "would reasonably construe" the rule in a way to cover or limit Section 7 activity. If any employee could reasonably construe the rule as limiting Section 7 activity, it would be unlawful.

This is further illustrated by the Board's recent decision in *Three D, LLC d/b/a Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014). The majority found the "term 'inappropriate' to be 'sufficiently imprecise' that employees would reasonably understand it to encompass 'discussion and interactions protected by Section 7.'" Slip Opinion p. 7. This is almost a formulation that where there is an ambiguity in a phrase or rule it should be construed against the drafter and enforcer of the rule, namely the employer. This contradicts, to some degree, the later statement that "many Board decisions [] have found a rule unlawful if employees would reasonably interpret it to prohibit protected activities." Slip Opinion p. 8. The word "would" should be replaced with the word "could." This would shift the burden to the employer to clarify its rules to eliminate interference with Section 7 rights.

Recently, the Board has also made it clear that where language "creates an ambiguity," that ambiguity "must be construed against the Respondent as the drafter of the [rule]." *Murphy Oil U.S.A., Inc.*, *supra*. 361 NLRB No. 72 at *19. The Board relied upon its prior decision in *Lafayette Park Hotel*, 326 NLRB No. 824, 828 (1998), *enforced,* 203 F.3d 52 (D.C. Cir. 1999). Here, there are patent ambiguities in the FUAP and the policies governing the FUAP. Thus, there is an ambiguity created that must be construed in light of *Murphy Oil* against the drafter of the rules, namely the employer. Under these circumstances, this is the perfect case in which to overrule *Lutheran Heritage Village-Livonia*. The *Lutheran Heritage Village-Livonia* application has allowed an interpretation of employer rules to be created from the employer perspective rather than from the view of a worker. Where the worker could read any reasonable interpretation into the rule that would prohibit Section 7 activity, it is overbroad as to that worker or a group of

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workers. The fact that some workers might reasonably construe it not to prohibit such Section 7 activity does not invalidate the fact that at least some employees could reasonably read the rule to prohibit Section 7 activity, and thus the rule would chill those activities. Where one employee understands the rule to prohibit Section 7 protected activity, at least an interference with Section 7 activity has been created.

We quote at length the dissent, and we will ask this Board to return to the view of the dissent:

> In *Lafayette Park Hotel*, *supra* at 825, the Board recognized that determining the lawfulness of an employer's work rules requires balancing competing interests. The Board thus relied upon the Supreme Court's view, as stated in *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945), that the inquiry involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 326 NLRB at 825. While purporting to apply the Board's test in *Lafayette Park Hotel*, the majority loses sight of this fundamental precept. Ignoring the employees' side of the balance, the majority concludes that the rules challenged here are lawful solely because it finds that they are clearly intended to maintain order in the workplace and avoid employer liability. The majority's incomplete analysis belies the objective nature of the appropriate inquiry: "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights."
>
> Our colleagues properly acknowledge that even if a "rule does not explicitly restrict activity protected by Section 7," it will still violate Section 8(a)(1) if—among other, alternative possibilities—"employees would reasonably construe the language to prohibit Section 7 activity." On this point, of course, the established test does not require that the only reasonable interpretation of the rule is that it prohibits Section 7 activity. To the extent that the majority implies otherwise, it errs. Such an approach would permit Section 7 rights to be chilled, as long as an employer's rule could reasonably be read as lawful. This is not how the Board applies Section 8(a)(1). See, e.g., *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").
>
> The majority asserts that it has considered the employees' side of the balance, in that it has found that the purpose behind the Respondent's rules—to maintain order and protect itself from liability—is so clear that it will be apparent to employees and thus could not reasonably be misunderstood as interfering with Section 7 activity. Although the Respondent's asserted pure motive in creating such rules may be crystal clear to our colleagues, it may not be as obvious to the Respondent's employees, especially in light of the other unlawful rules maintained by the Respondent. Rather,

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> for reasons explained below, we find that the challenged rules are facially ambiguous. The Board construes such ambiguity against the promulgator. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 299 fn. 8 (1978).

Id. at 650 (footnote omitted).

This reasoning was correct then and governs now.

C. THE BOARD HAS EFFECTIVELY OVERRULED *LUTHERAN HERITAGE VILLAGE-LIVONIA* BY APPLYING THE RULE OF CONSTRUING AMBIGUITIES AGAINST THE EMPLOYER

The Board has already effectively overruled *Lutheran Heritage Village-Livonia*. It has in recent cases made it clear that "[w]here employees would reasonably read an ambiguous rule to restrict their Section 7 rights, the Board construes the ambiguity in the rule against the rule's promulgator. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enf'd*, 203 F.3d 52 (D.C. Cir. 1999). *Prof' Janitorial Serv., supra*, *Murphy Oil USA, supra*, and *Caesars Entm't, supra*. *Lutheran Heritage Village-Livonia* cannot survive the logic. Once there is an ambiguity, some employees will construe the rule to prohibit Section 7 activity. It is then inconsistent to hold that when the hypothetical employee who is deemed reasonable (meaning the NLRB) reads it one way, the Board ignores the other reasonable employees who read the rule to proscribe Section 7 activity. In effect, the Board has overruled *Lutheran Heritage Village-Livonia*, and it should now so state.

D. CONCLUSION

In summary, *Lutheran Heritage Village-Livonia* should be expressly overruled. Alternatively the Board should concede that it has effectively done so.

XXI. THE RELIGIOUS FREEDOM RESTORATION ACT EXTENDS TO THE CORE RELIGIOUS ACTIVITY OF HELPING OTHER WORKERS, AND THE FAA, NLRA AND NORRIS-LAGUARDIA ACT HAVE TO BE APPLIED TO PROTECT THIS RELIGIOUS RIGHT

Section 7 protects the right of employees to engage in concerted protected activity. That extends to asking for help in work place issues from other employees. *Fresh & Easy Neighborhood Market*, 361 NLRB No 12 (2014). Such concerted activity is a central principle of religion, including any brand of religion that the employer professes in the work place. Section 7

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activity is a core religious activity. The solidarity principle drawn from this case is the essence of religion. Protected concerted activity for mutual aid and protection is core religious activity.

In 1993, Congress enacted the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb–2000bb-4. It was enacted in response to a Supreme Court decision, *Employment Division v. Smith*, 494 U.S. 872 (1990), which many saw as restricting the exercise of religion.

The Act in relevant part provides:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

The statute does not apply to state government. See, *City of Boerne v. P. F. Flores*, 521 U.S. 507 (1997).[38]

The RFRA has been the subject of litigation. It, however, came boldly to the attention of the public in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

> Hobby Lobby operates according to "Christian" principles; Hobby Lobby's statement of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." App. in No. 13–354, pp. 134–135 (complaint). Each family member has signed a pledge to run the businesses in accordance with the family's religious

[38] Congress subsequently amended the RFRA to apply, in part, to certain state actions. See Religious Land Use and Institutionalized Persons Act of 2000, 42. U.S.C. § 2000cc, *et seq*.

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> beliefs and to use the family assets to support Christian ministries. 723 F.3d, at 1122. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. *Id.*, at 1122; App. in No. 13–354, at 136–137.

Burwell v. Hobby Lobby Stores, Inc., *supra*, 134 S.Ct. at 2766.

Moreover, the Court noted:

> Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens [owners of Hobby Lobby] and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees. See, App. to Pet. for Cert. in No. 13–356, p. 11g; App. in No. 13–354, at 139.

Id.

The Supreme Court in *Burwell* held that the application of a portion of the Affordable Care Act imposes substantial burden on the religious beliefs of the owners of Hobby Lobby. It did so because there was a regulation requiring that contraceptives be provided over the religious objections of the owners. The Court held that this "contraceptive mandate imposes a substantial burden on the exercise of religion." *Id*. at 2779.

The Court then went on to state:

> The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A).

Id. at 2754.

Recently, the Tenth Circuit described the application of the RFRA:

> Most religious liberty claimants allege that a generally applicable law or policy without a religious exception burdens religious exercise, and they ask courts to strike down the law or policy or excuse them from compliance. Our circuit's three most recent

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> RFRA cases fall into this category. In *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114 (10th Cir.2013) (en banc), *aff'd sub nom. Hobby Lobby,* —— U.S. ——, 134 S.Ct. 2751, 189 L.Ed.2d 675, the ACA required the plaintiffs to provide their employees with health insurance coverage of contraceptives against their religious beliefs. In *Yellowbear v. Lampert,* 741 F.3d 48 (10th Cir.2014), a prison policy denied the plaintiff access to a sweat lodge, where he wished to exercise his Native American religion. In *Abdulhaseeb v. Calbone,* 600 F.3d 1301 (10th Cir.2010), a prison policy denied the plaintiff a halal diet, which is necessary to his Muslim religious exercise. In each instance, the law or policy failed to provide an exemption or accommodation to the plaintiff(s).
>
> The Supreme Court's recent ruling in *Holt v. Hobbs,* 135 S.Ct. 853, 2015 WL 232143 (2015), which concerned a prison ban on inmates' growing beards, is another recent example of the more common RFRA claim. The plaintiff in *Holt* sought to grow a beard in accordance with his Muslim faith. In *Holt,* like in *Hobby Lobby,* the government defendants insisted on a complete restriction and did not attempt to accommodate the plaintiff's religious exercise. The plaintiff in *Holt* proposed a compromise—he would be allowed to grow only a half-inch beard—which the prison refused. 135 S.Ct. at 861. The Court ultimately approved this compromise in its ruling. *Id.* at 867.

Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151, 1170-1171 (10th Cir.) *cert. granted sub nom. S. Nazarene Univ. v. Burwell,* 136 S. Ct. 445 (2015) *and cert. granted in part sub nom. Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Burwell, 136 S. Ct. 446 (2015).*

That Court went on to explain in some detail the RFRA application:

> RFRA was enacted in 1993 in response to *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), in which the Supreme Court held that burdens on religious exercise are constitutional under the Free Exercise Clause if they result from a neutral law of general application and have a rational basis. *Id.* at 878–80; *United States v. Hardman,* 297 F.3d 1116, 1126 (10th Cir.2002). Congress enacted RFRA to restore the pre-*Smith* standard, which permitted legal burdens on an individual's religious exercise only if the government could show a compelling need to apply the law to that person and that the law did so in the least restrictive way. *Smith,* 494 U.S. at 882–84; *see also Hobby Lobby,* 134 S.Ct. at 2792–93 (Ginsburg, J., dissenting). Congress specified the purpose of RFRA was to restore this compelling interest test as it had been recognized in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). *See* 42 U.S.C. § 2000bb(b)(1).
>
> By restoring the pre-*Smith* compelling interest standard, Congress did not express any intent to alter other aspects of Free Exercise

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jurisprudence. *See id.; Hobby Lobby*, 723 F.3d at 1133 ("Congress, through RFRA, intended to bring Free Exercise jurisprudence back to the test established before *Smith.* There is no indication Congress meant to alter any other aspect of pre-*Smith* jurisprudence...."). Notably, pre-*Smith* jurisprudence allowed the government "wide latitude" to administer large administrative programs, and rejected the imposition of strict scrutiny in that context. As the Supreme Court indicated in *Bowen v. Roy*,

"In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest".

476 U.S. 693, 707, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986).

As we discuss at greater length below, the pre-*Smith* standards restored by RFRA permitted the Government to impose *de minimis* administrative burdens on religious actors without running afoul of religious liberty guarantees.

3. **Elements of RFRA Analysis**

RFRA analysis follows a burden-shifting framework. "[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a(2) sincere (3) exercise of religion." *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir.2001); *see* 42U.S.C. § 2000bb–1(a). The burden then shifts to the government to demonstrate its law or policy advances "a compelling interest implemented through the least restrictive means available." *Hobby Lobby*, 723 F.3d at 1142–43. The government must show that the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 1126 (quotations and citation omitted). "This burden-shifting approach applies even at the preliminary injunction stage." *Id.*

We have previously stated "a government act imposes a 'substantial burden' on religious exercise if it: (1) requires participation in an activity prohibited by a sincerely held religious belief, (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby*, 723 F.3d at 1125–26 (quotations and alterations omitted); *see also Yellowbear*, 741 F.3d at 55 (applying this framework to RLUIPA); *Abdulhaseeb*, 600 F.3d at 1315 (same). As we discuss in the next section, whether a law substantially burdens religious exercise in one or more of these ways is a matter for courts—not plaintiffs—to decide.

4. **Courts Determine Substantial Burden**

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> To determine whether plaintiffs have made a prima facie RFRA claim, courts do not question "whether the petitioner ... correctly perceived the commands of [his or her] faith." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *see Hobby Lobby*, 723 F.3d at 1138–40. But courts do determine whether a challenged law or policy substantially burdens plaintiffs' religious exercise. RFRA's statutory text and religious liberty case law demonstrate that courts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise.
>
> RFRA states the federal government "shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb–1(a). We must "give effect ... to every clause and word" of a statute when possible. *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955). Drafts of RFRA prohibited the government from placing a "burden" on religious exercise. Congress added the word "substantially" before passage to clarify that only some burdens would violate the act. 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statements of Sen. Kennedy and Sen. Hatch).
>
> We therefore consider not only whether a law or policy burdens religious exercise, but whether that burden is substantial. If plaintiffs could assert and establish that a burden is "substantial" without any possibility of judicial scrutiny, the word "substantial" would become wholly devoid of independent meaning. *See Menasche*, 348 U.S. at 538–39. Furthermore, accepting any burden alleged by Plaintiffs as "substantial" would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise.

Id at 1175- 1177. (fn. omitted)

To the extent that the FAA enforces a prohibition against collective activity, it not only burdens but prohibits such collective activity, which is a core religious activity. Here, there is clear tension: the right to help the fellow worker protected by the NLRA and the Norris LaGuardia Act against the limitation imposed by the application of the FAA. The RFRA teaches that the FAA must give way to the religious right to help fellow workers.

Nor is there any governmental interest. The NLRA and Norris-LaGuardia Act defeat the argument that there is any governmental interest in forbidding or burdening group action. They serve to protect such activity.

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Finally, the application of the FAA cannot comply with the RFRA by disallowing all group actions, because it does not reflect a "least restrictive" means of accomplishing any compelling governmental interest in preserving and protecting arbitration in general.

> The least-restrictive-means standard is exceptionally demanding, see *City of Boerne*, 521 U.S., at 532, 117 S.Ct. 2157, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. See §§ 2000bb–1(a), (b) (requiring the Government to "demonstrat[e] that application of [a substantial] burden to the person ... is the least restrictive means of furthering [a] compelling governmental interest" (emphasis added)).

Burwell v. Hobby Lobby Stores, Inc., *supra* at, 2780,

The FAA could be applied to contracts in all its aspects with this one exception of application to concerted claims in arbitration by employees governed by the NLRA. Carving out this exception, which is limited, would be the "least restrictive" means of achieving the goals of the FAA without interfering with the religious rights of employees.[39] Thus, the FAA would apply in the *AT&T v. Concepcion*, 563 U.S. 321 (2011), context because no employee religious rights were at issue. This would not affect any other policies that animate the FAA doctrines.

The question, then, is whether, when workers get together to benefit themselves in the workplace, this is a religious exercise. That question is easily answered in the affirmative.

Religions are replete with references to the workplace. The religious exercise to help the fellow worker is a fundamental tenet of every religion. Whether we use the phrase "brotherly love" or otherwise, every religion encourages workers to help each other to make themselves and the workplace better.[40] The central religious act of helping other workers is a core principle of Christianity and all religions.

Hobby Lobby brought its lawsuit to challenge a portion of the Affordable Care Act

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[39] The FAA already carves out maritime transactions and contracts of employment for employees involved in transportation.

[40] This is just a religious version of the solidarity principle explained by the Board in *Fresh and Easy*, *supra*. This is the application of the most fundamental religious principle: the Golden Rule. See https://en.wikipedia.org/wiki/Golden_Rule. If some fellow employees ask for help regarding a workplace issue, the other employee should help the first. The employer directly contradicts the Golden Rule.

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because it claimed that statute burdened its religious exercise. The Court found, against the government's arguments, that the Affordable Care imposed a substantial burden on religious activity and found that the government could not establish that it imposed the least restrictive means of establishing any governmental interest.

Here, we have three federal laws at issue:

- The National Labor Relations Act, 29 U.S.C. § 151, *et seq*.;
- The Norris-LaGuardia Act, 29 U.S.C. § 11, *et seq*.; and
- The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

The RFRA supersedes any governmental restriction on the free exercise of such religious activity. To the extent that those laws are interpreted in any way to burden the religious exercise of helping fellow workers, the Religious Freedom Restoration Act requires that super strict scrutiny be applied.

Here, the National Labor Relations Act governs the right of employees to engage in concerted activities. It is nothing more than workers getting together to help themselves and their families. Thus, there is nothing inconsistent with the application of Section 7, but any limitation on the application of Section 7 would be contrary to the religious views of those who want to help fellow workers.[41]

The Norris-LaGuardia Act is to the same effect.

Here, the employer will argue that the Federal Arbitration Act forecloses the application of the National Labor Relations Act and the Norris-LaGuardia Act. The problem, however, with the employer's argument is that the Religious Freedom Restoration Act must be interpreted and applied in a way that protects the religious right of employees to engage in concerted activity. In this case, the concerted activity would be to present group claims in order to benefit workers as a group. This is nothing more than concerted activity.[42]

[41] Respondent may argue the RFRA cannot apply. But that is contrary to its argument that the FAA applies. The Board must consider the impact of all relevant federal statutes.

[42] These principles would not apply to most of the situations addressed by *AT&T v. Concepcion*, 563 U.S. 321 (2011), which involved commercial disputes.

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There is no doubt that the Federal Arbitration Act, if applied to foreclose concerted activity, would substantially burden the exercise of religion by those employees who wanted to work together to help their brothers and sisters in the workplace. It would also burden those employees of other employers. See David B. Schwartz, "The NLRA's Religious Exemption in a Post Hobby Lobby World: Current Status, Future Difficulties, and A Proposed Solution," 30 A.B.A. J. Lab. & Emp. L. 227 (2015) (explaining that the RFRA does apply to the NLRA).

The burden shifts at that point under the RFRA for the government to establish that that substantial burden "is in the furtherance of compelling government interest." Here, there is no governmental interest.[43] The government can simply allow, consistent with the government interest established by National Labor Relations Act and the Norris-LaGuardia Act, employees to present their claims concertedly in some forum. Nothing in this case requires that that forum be arbitration. That forum can be arbitration or in court. This is the central thrust of *Murphy Oil*. What an employer cannot do, consistent with the National Labor Relations Act, the Norris-LaGuardia Act and the Religious Freedom Restoration Act, is entirely foreclose workers working together to make their workplace a better circumstance.

For these reasons, the Religious Freedom Restoration Act applies to this case.[44] The Federal Arbitration Act cannot be applied to interfere with the religious right of employees to help other employees by prohibiting employees from jointly working together to improve the workplace and to help fellow workers with respect to wages, hours and working conditions.[45]

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[43] It is clear that this is not "the least restrictive means of further compelling the governmental interest."

[44] The religious exemption principles that we derive from the RFRA are already in place and have been long recognized for those who have some religious objection to joining a supporting union. See 29 U.S.C. § 159. There are some religions that have the basic tenet that adherents should not join or support unions. Title 7 also recognizes that an accommodation is sometimes necessary. See *EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990) (because employee's religious objection was to union itself, reasonable accommodation was required allowing him to make charitable donation equivalent to amount of union dues, instead of paying dues). Religious principles often govern and require an accommodation. *EEOC v. Abercrombie & Fitch Stores Inc.*, 135 S.Ct. 2028, 2015 WL 2464053 (2015). This case represents this principle: there are those who believe that it is a basic religious tenet to help fellow workers. Title VII thus requires an accommodation, workers who believe it is a religious exercise to help their fellow workers must be accommodated.

[45] The Board must address the application of the RFRA because it contains a statutory fee requirement. Charging Party is entitled to its fees if it prevails on this ground.

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XXII. THE REMEDY

The remedy should include the following.

The employer should be required to post permanently the Board's ill-fated employee rights notice. https://www.nlrb.gov/poster. The Courts that invalidated the rule noted that such a notice could be part of a remedy for specific unfair labor practices. It is time for the Board to impose the requirement for a lengthy posting of that notice as a remedy for unfair labor practices.

Additionally, any notice that is posted should be posted for the period of time from when the violation began until the notice is posted. The short period of 60 days only encourages employers to delay proceedings, because the notice posting will be so short and so far in the future.

The Notice should be included with any payroll statements. See California Labor Code Section 226.

The Board's Notice and the Decision of the Board should be mailed to all employees. Simply posting the notice without further explanation of what occurred in the proceedings is not adequate notice for employees. The Board Decision should be mailed to former employees and provided to current employees.

Notice reading should be required in this matter. That Notice reading should require that a Board Agent read the Notice and allow employees to inquire as to the scope of the remedy and the effect of the remedy. Simply reading a Notice without explanation is inadequate. Behavioralists have noted that, "[t]aken by itself, face-to-face communication has a greater impact than any other single medium." Research suggests that this opportunity for face-to-face, two-way communication is vital to effective transmission of the intended message, as it "clarifies ambiguities, and increases the probability that the sender and the receiver are connecting appropriately." Accordingly, a case study of over five hundred NLRB cases, commissioned by the Chairman in 1966, strongly advocated for the adoption of such a remedy, recommending "providing an opportunity on company time and property for a Board Agent to read the Board Notice to all employees and to answer their questions." The employer should not be present. The Union should be notified and allowed to be present. This should be on work time and paid. If the

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employees are working piece rate, the rate of pay should be equal to their highest rate of pay to avoid any disincentive to attend the reading.

The employer should not be allowed to implement a new FUAP. The Board does not possess that power. A new FUAP can only occur after there has been a complete remedy of the violations found in this case. In other words, the Employer may not implement any new policy until after it has completely remedied this case by rescinding all the unlawful policies, posting an appropriate notice allowing employees to take appropriate legal action without the implementation of any purported forced arbitration waiver.

The traditional notice is also inadequate. The standard Board notice should contain an affirmative statement of the unlawful conduct. We suggest the following:

> We have been found to have violated the National Labor Relations Act. We illegally maintained an Alternative Dispute Resolution Policy which contained an unlawful arbitration policy. We have rescinded that unlawful policy. We have agreed to toll the statute of limitation for any claims which employees may have.

Absent some affirmative statement of the unlawful conduct, the employees will not understand the arcane language of the notice. Nor is the notice sufficient without such an admission. In effect, the way the notice is framed is the equivalent of a statement that the employer will not do specified conduct, not an admission or recognition that it did anything wrong to begin with.

The Notice should require that the person signing the notice have his or her name on the notice. This avoids the common practice where someone scrawls a name to avoid being identified with the notice, and the employees have no idea who signed it.

All covered claims should be tolled until the FUAP is remedied.

The employees should be allowed work time to read the Board's Decision and Notice.

The employer should be required to toll the statute of limitations for any claims for the period during which the FUAP has been in place until a reasonable time after employees received the notice so that they may assert any collective or group claims that they have. Otherwise, the Employer would have had the advantage of forestalling and foreclosing group claims. This

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would give employees an opportunity to learn that the FUAP has been rescinded and that they may bring group or collective claims. Interest should be awarded on any claims that are tolled.

The employees should be allowed work time to read the Board's Decision and Notice. To require that they read the Notice, whether by email, on the wall or at home, on their own time is to punish them for their employer's misdeeds.

The Notice should be read to employees by a Board agent outside the presence of management. Representatives of the Charging Party should be present. Employees should be allowed to ask questions.

XXIII. CONCLUSION

Montecito's FUAP is unlawful. The Board should find it is unlawful and order the remedies sought in this case by the Charging Party. The Board must squarely face the application of the Federal Arbitration Act under the Commerce Clause. The FAA may not be constitutionally applied save this FUAP.

Dated: July 21, 2016

WEINBERG, ROGER & ROSENFELD
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By: /s/ DAVID A. ROSENFELD
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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On July 21, 2016, I served the following documents in the manner described below:

BRIEF TO THE ADMINISTRATIVE LAW JUDGE

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 21, 2016, at Alameda, California.

/s/ Karen Kempler
Karen Kempler

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